INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Constitutional provisions and statute involved	2
Statement	3
Specification of errors to be urged	4
Argument:	
I. The effect of the decision of the lower Federal court on this question is far-reaching	4
II. Decisions interpreting the Eleventh Amendment are not applicable	7
III. Decisions involving changes from territorial to state governments indicate that the courts still have power over National Prohibition Act violations	9
IV. The court below should not have applied the common law rule to the Twenty-first Amendment, as such rule is opposed to present public policy, but it should have applied the principles of the statutory rule	17
Conclusion	29
Appendix: Statutes of the several States abrogating the common law rule of construction	30

CITATIONS

Cases:	
Chisholm v. *Georgia*, 2 Dall. 419	8
Draper v. *United States*, 164 U.S. 240	14
Funk v. *United States*, No. 394, Oct. Term, 1933, decided December 11, 1933	27
General Pinckney, 5 Cranch 281	5, 22
Goldberg v. *United States*, 280 Fed. 89, certiorari denied, 260 U.S. 728	18
Great Northern Railway Co. v. *United States*, 208 U.S. 452	23
Green v. *United States* (C.C.A. 9th), unreported	4, 7, 16, 17, 21, 26
Gulf, Col. & Santa Fe Ry. v. *Dennis*, 224 U.S. 503	7
Hans v. *Louisiana*, 134 U.S. 1	8
Hertz v. *Woodman*, 218 U.S. 205	7, 24
Hollingsworth v. *Virginia*, 3 Dall. 378	7, 8, 9
Moore v. *United States*, 85 Fed. 465	15
Pickett v. *United States*, 216 U.S. 456	7, 14
Robertson v. *Baldwin*, 165 U.S. 281	17
Sonora, City of v. *Curtin*, 137 Cal. 583	16
United States v. *Barr*, 4 Sawyer 254	6, 20, 28
United States v. *Baum*, 74 Fed. 43	9, 10, 15

Cases—Continued. Page

United States v. *McBratney*, 104 U. S. 621 14
United States v. *Oliver* (W.D.Pa.), unreported 4
United States v. *Reisinger*, 128 U.S. 398 6
United States v. *Tynen*, 11 Wall. 88 19
United States v. *Ulrici*, 3 Dillon 532 5
United States v. *Wong Kim Ark*, 169 U.S. 649 17

Constitution and Statutes (United States):

Constitution:

Eleventh Amendment 7, 8
Twenty-first Amendment 2

Revised Statutes, Sec. 13 (U.S.C., Title 1, Sec. 29) 3
Act of February 25, 1871, c. 71, 16 Stat. 431 (now Revised Statutes, Sec. 13, U.S.C., Title 1, Sec. 29) 19

Statutes (Canada):

Revised Statutes, 1927, c. 1, Sec. 19 25

Statutes (England):

Interpretation Act, 1889, 52 & 53 Vict. c. 63, Sec. 38 25

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 659

THE UNITED STATES OF AMERICA, APPELLANT

v.

BYRUM GIBSON AND CLAUDE CHAMBERS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 7) has not yet been reported.

JURISDICTION

The judgment to be reviewed was entered December 6, 1933 (R. 10), and the petition for appeal to this Court was allowed December 12, 1933 (R. 11). The jurisdiction of this Court rests upon the provisions of the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U.S.C., Title 18, Sec. 682), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The single question presented is whether the repeal of the Eighteenth Amendment had the effect of re-

leasing and extinguishing all criminal liabilities incurred under the National Prohibition Act, or incurred under Section 37 of the Criminal Code by conspiring to violate the National Prohibition Act, where the criminal liabilities had been incurred before the ratification of the Twenty-first Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Article XXI of the Amendments to the Constitution was ratified on December 5, 1933, and provides:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled* (*two-thirds of each House concurring therein*), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by conventions in three-fourths of the several States:
>
> "ARTICLE —
>
> "SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> "SEC. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.
>
> "SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitu-

> tion, within seven years from the date of the submission hereof to the States by the Congress."

Section 13 of the Revised Statutes (U.S.C., Title 1, Sec. 29) provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

STATEMENT

The appellees were indicted in the District Court of the United States for the Middle District of North Carolina for conspiring to violate the National Prohibition Act and for transportation and possession of intoxicating liquor in violation of the National Prohibition Act. (R. 2.) The indictment was returned in June, 1933. (R. 5.) On December 6, 1933, the appellee Claude Chambers (who had theretofore entered a plea of guilty, R. 6) filed what he termed a "plea in abatement" in which he objected to the entry of any judgment against him for the reason that, since the repeal of the Eighteenth Amendment, the court had no jurisdiction to proceed further in the case. On the same date, the appellee Byrum Gibson demurred to the pending indictment upon the same grounds. (R. 6.) The trial court thereupon dismissed the indictment. (R. 10.)

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred—

(1) In dismissing the indictment.

(2) In holding that the repeal of the Eighteenth Amendment to the Constitution of the United States by the adoption of the Twenty-first Amendment had the effect of releasing and extinguishing all penalties and criminal liabilities incurred under the National Prohibition Act, as amended and supplemented.

ARGUMENT

I

THE EFFECT OF THE DECISION OF THE LOWER COURT ON THIS QUESTION IS FAR-REACHING

Since December 5, 1933—the effective date of the Twenty-first Amendment—four lower Federal courts, in addition to the court below, have passed on the question here involved. The Circuit Court of Appeals for the Ninth Circuit in *Green* v. *United States* (unreported)[1] and Judge Gibson in the Western District of Pennsylvania in *United States* v. *Oliver* (unreported)[1] have held that there is no longer any power to punish for past violations of the National Prohibition Act. On the other hand, Judge Atwell in the Northern District of Texas and Judge Baker in the Northern District of West Virginia have held to the contrary though no written opinions were rendered.

It was the rule of the common law that if a statute expired or was repealed, before final judgment had been rendered, the court was deprived of power to

[1] Photostatic copies of these two opinions are presented.

proceed to judgment in pending criminal cases, unless there was a saving clause in the law.

This rule of construction was laid down by Chief Justice Marshall in the case of *General Pinkney*, 5 Cranch 281, in the following terms:

> * * * it has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute.

In consequence of this rule of construction, Congress passed in 1871, Section 13 of the Revised Statutes (U.S.C., Title 1, Sec. 29). This is a general saving clause applicable to all legislation, unless the repealing legislation expressly provides to the contrary.

This rule of construction absolutely reversed the rule of the common law.

In the case of *United States* v. *Ulrici*, 3 Dillon 532, in an opinion rendered by Mr. Justice Miller of the Supreme Court, who was assigned to the Eighth Circuit, he said:

> * * * the 13th section of the Revised Statutes contains a general provision changing, as I conceive, the rule of the common law, that a statute modifying the punishment of a crime prescribed by a prior law operates as a repeal of that law. There is no doubt that that general proposition is sound.
>
> Any statute that varies the definition or the punishment of an offence abrogates the former

> statute; and no offences committed under it can, by a well-known principle of the law, be punished, unless the later act contains a saving clause. But, as I remarked, the Revised Statutes changed this rule of the common law. They were intended to change it, and it is only the extent of the change which is here questioned.

The *Ulrici* case was cited with approval in *United States* v. *Reisinger*, 128 U.S. 398, 402.

Though it was said to be a rule "settled on general principle," the rule developed "many a lame and impotent conclusion in criminal cases, in which the defendant escaped punishment because the legislature, in the hurry and confusion of amending and enacting statutes, had forgotten to insert a clause to save offenses and liabilities already committed or incurred from the effect of express or implied repeal." (*United States* v. *Barr*, 4 Sawyer 254, 257.)

In repealing the Eighteenth Amendment, the Twenty-first Amendment had the effect of repealing the National Prohibition Act. And the courts which have rendered opinions on the question here involved have accordingly treated the Twenty-first Amendment as though it were subject to the strict common law rule of construction. In applying this rule they have, however, become confused by the constitutional phase of the case; have mixed statutes with principles; have failed to apply principles of construction to a constitutional amendment because those principles, in addition to being principles, happened also to be embodied in statute.

As "the serious consequence sometimes incident to this common-law rule of construction" (*Hertz* v. *Woodman*, 218 U.S. 205, 216) was not considered by these courts, some of them should be indicated. The rule, if applicable, would seem to cover all pending cases, both those pending in the trial courts and those now in the appellate courts. As this Court said in *Gulf, Col. & Santa Fe Ry.* v. *Dennis*, 224 U.S. 503, 506, it even "requires the reversal of a judgment which was right when rendered." The *Green* case in the Ninth Circuit was an instance of dismissal by an appellate court. In the court below, conspiracies punishable under Section 37 of the Criminal Code were affected by the rule. Indeed, the application of the rule amounts to what this Court referred to in *Pickett* v. *United States*, 216 U.S. 456, 459, as an "automatic amnesty for crimes." Since the rule applied is merely one of construction, it should yield if legal principles permit the adoption of a different rule of construction.

II

DECISIONS INTERPRETING THE ELEVENTH AMENDMENT ARE NOT APPLICABLE

The precise question here involved has never been passed upon by this Court. However, the court below stressed the decision of this Court in *Hollingsworth* v. *Virginia*, 3 Dall. 378, which held that the adoption of the Eleventh Amendment affected all cases, past as well as future. But we submit that the case is readily distinguishable due to the marked precision with which the Eleventh Amendment was framed.

The language of that Amendment is that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, *commenced or prosecuted* against one of the United States by citizens of another State or by citizens or subjects of any foreign state." (Emphasis ours.) After the adoption of this Amendment, the question was submitted in the *Hollingsworth* case whether the Amendment did, or did not, supersede all suits pending as well as prevent the institution of new ones of the prohibited class. For the negative it was argued that, though the words "commenced or prosecuted" were properly in the past tense, they ought not to be so grammatically restricted; but the words should be construed to apply only to suits to be "commenced or prosecuted"; that such construction would avoid an *ex post facto* effect, and that pending suits would be saved. During the presentation of this argument, however, Mr. Justice Chase interrupted to say (p. 379): "The words 'commenced or prosecuted,' standing alone, would embrace cases both past and future." Obviously, when, on the succeeding day, this Court unanimously decided that the Eleventh Amendment affected any case, past or future, it felt bound by the words "commenc*ed* and prosecut*ed*." As stated later, in *Hans* v. *Louisiana*, 134 U. S. 1, 11, 12, the Eleventh Amendment "reversed the decision of the Supreme Court" in *Chisholm* v. *Georgia*, 2 Dall. 419.

Chisholm v. *Georgia*, and other cases like it, were actually pending at the time of the adoption of the

Eleventh Amendment for they were "swept at once from the records of the court" after the decision in *Hollingsworth* v. *Virginia*.[2] There was, therefore, reason why the Eleventh Amendment should expressly refer to "commenced," or pending, cases. But where the Eleventh Amendment expressly superseded all cases "commenced," the Twenty-first Amendment not only contains no such limitation but is entirely silent upon the matter.

III

DECISIONS INVOLVING CHANGES FROM TERRITORIAL TO STATE GOVERNMENTS INDICATE THAT THE COURTS STILL HAVE POWER OVER NATIONAL PROHIBITION ACT VIOLATIONS

The Twenty-first Amendment involved, in effect, a transfer of power to the States by the Federal Government. In this, the present situation is comparable to that which arose when Territories, which had been subject to Federal control, entered the Union as States.

For that reason, *United States* v. *Baum*, 74 Fed. 43, is much like the case at bar. On November 21, 1895, Baum was indicted in the District Court of the then Territory of Utah, for adultery committed on the 25th day of September, 1895, in said Territory. The indictment was pending in such District Court when Utah became a State on January 4, 1896 (29 Stat. 876). The crime of adultery was defined by the Act of Congress of March 3, 1887, commonly known as the "Edmunds-Tucker Act," and was by that Act

[2] See footnote in 2 Dall. 479.

made a crime not only in the Territories, but in any other place of which the United States had exclusive jurisdiction.

After Utah was admitted to the Union, the indictment was transferred to the United States Circuit Court of Utah. There Baum moved for a dismissal on the ground that the law under which he was indicted ceased to operate when Utah was admitted as a State, or as stated in the motion "was repealed by the admission of Utah to statehood," and that there was no law of the United States in force in Utah making the act charged against him a crime, or authorizing its punishment. The trial took place in the United States Circuit Court on April 6, 1896.

The Utah Enabling Act and the ordinance adopted by its authority made the United States Circuit Court the successor of the territorial court as to this case, and process initiating in the latter court could be proceeded with in the United States Circuit Court, provided there was authority to punish the defendant for the crime charged. The court said:

> But it is contended that the power to punish in this case has ceased, because Utah was admitted as a state on the same footing as the other states, and, as claimed, the United States is without constitutional power to make criminal the act charged in the indictment, if now committed in Utah; and hence it has lost the power to punish the defendant for it. If the act would not constitute a crime against the United States if now committed, it would not follow that the power to punish it was lost.

There seems to be no objection, in principle, to punishing under a statute which makes an act criminal when committed within a particular time, although such punishment be not inflicted until the expiration of that time. *Stevens* v. *Dimond*, 6 N.H. 330; Bish. St. Crimes, Sect. 182. It is true that no punishment can be inflicted for an act after the repeal, without a saving clause, of the law prohibiting it and prescribing its punishment; but this is because there would remain no law in existence authorizing the court to proceed. * * *

This is as true of repeals by implication, as of other repeals, but it is not necessary that the act charged as criminal should continue to be prohibited. The crime is complete as of the date of the criminal act, and, unless there be a remission, by the repeal of the only law which authorizes its punishment, or by direct pardon, such punishment may be inflicted. This is shown by the admittedly valid statutes of the United States, and of most of the states, to the effect that such a repeal in criminal cases should not affect causes of prosecution already accrued. Rev. Stat. U.S. Sec. 13. Wherever there is such general saving clause, or a similar special saving clause in the repealing act, the authority to punish is still preserved, and the intent, otherwise inferable, that the repeal should operate as a remission of past offenses, is negatived.

But it is said that Congress had no constitutional power to save the right to punish this offense after Utah became a state, unless

it had the power to make the act criminal if thereafter committed in Utah. No authority is cited in support of this claim, and I have been able to find none. It is predicated upon the theory that, in order to punish a crime against its laws, the United States must retain its sovereignty over the place where the crime was committed, in respect to the subject matter of the crime. * * *

Having the constitutional power to prohibit the act and prescribe a punishment, the United States retains the power to inflict such punishment, independent of the continued exercise of absolute, or, indeed, of limited, sovereignty over the place of the commission of the offense. The jurisdiction of consular courts of the United States rests on this principle. Having the power to prescribe the offense, Congress had the power to authorize the punishment of the offender at such time or place as it might designate, within or without a state; so that, if it be admitted that the law under which this indictment was found has been repealed by implication, with respect to Utah, still the power to punish past offenses under it is saved both by the express language of section 13, Rev. St. U.S., and by the intent to save pending prosecutions shown in section 17 of the Utah enabling act.

In the *Baum* case, Congress had full power and authority to enact the statute making adultery a crime in the Territory of Utah. Prior to the admission of Utah into the Union, the defendant violated the statute and was indicted in the territorial court

of Utah, but before trial, and while the case was pending, Utah was admitted into the Union. The admission of Utah to statehood was by the joint action of Congress and the people of Utah as, in the instant case, the repeal of the Eighteenth Amendment was by the joint act of Congress and the people of the United States. By the admission of Utah, the criminal jurisdiction of Congress over the territory embracing the new State was completely destroyed except as to such territory in the new State within the exclusive jurisdiction of the United States.

So by the ratification of the Twenty-first Amendment, the power of Congress to legislate as to the sale of intoxicating liquors in North Carolina was destroyed, except as reserved in the Amendment.

Baum contended that as Congress had no power after the admission of Utah to statehood to enact a statute making criminal adultery committed in that State, the court could not after the admission punish him for a violation of the statute committed prior to the admission, as the power of Congress to enact such a statute was taken away. But the court held that under Section 13 of the Revised Statutes, the saving statute, the right to proceed to judgment was saved.

So in the case at bar, the ~~Government~~ Defendants contends that as Congress after the repeal of the Eighteenth Amendment has no power to enact a statute making criminal the sale of intoxicating liquors in North Carolina, the court cannot, after the repeal, punish them for an offense, in violation of the statute, committed before the repeal. But as was said in the *Baum* case, the

power to punish past offenses is saved by the express language of Section 13 of the Revised Statutes, which has remained in full force and effect since 1871.

This Court in *Pickett* v. *United States*, 216 U. S. 456, 459, cited with approval the "elaborately considered" opinion in the *Baum* case.

In the *Pickett* case, the defendant, a negro, was indicted in the United States District Court for the Western District of Oklahoma, for the murder of a negro within the limits of an Indian Reservation. The murder was charged as having been committed on October 14, 1907. The State of Oklahoma was admitted to the Union on November 16, 1907. The offense was, therefore, committed before its admission as a State, and the defendant was after such admission indicted and convicted of a capital offense in a United States court for the Western District of the State of Oklahoma.

After the murder was committed, but before the defendant was indicted, Oklahoma had been admitted into the Union. The law was settled that the admission of a State into the Union destroyed the former Federal jurisdiction over Indian Country included in the new State and withdrew from the United States and Congress, and conferred upon the State, the exclusive control and jurisdiction of offenses committed by a person not of Indian blood against a person not of Indian blood. *United States* v. *McBratney*, 104 U.S. 621; *Draper* v. *United States*, 164 U.S. 240.

So that after the admission of Oklahoma into the Union, the power of Congress to enact a law punishing

the crime of murder committed by a negro against a negro was at an end, and at the time the defendant was tried and convicted for murder, Congress was stripped of its power and jurisdiction over this crime in that country. Yet a conviction for the capital offense of murder, committed while the law was in force, was upheld by this Court. "The jurisdiction of the Court was challenged by motion to quash, by demurrer and by motion in arrest of judgment." This Court held that it was competent for Congress to provide as it did in the Fourteenth Section of the Enabling Act for the transfer of jurisdiction to the Federal courts created in the new State, and that the power to punish was not lost—citing the elaborately considered decision in *United States* v. *Baum, supra.*

Moore v. *United States*, 85 Fed. 465 (C.C.A. 8th), also a territorial case, is apparently principally relied upon by the Circuit Court of Appeals in the *Green* case, as that court quoted nearly two pages from this opinion.

It is apparent from a reading of the excerpts quoted that it is not an authority for the position taken by that court. After quoting Section 13 of the Revised Statutes, the court in the *Moore* case said (p. 470):

> It is clear from the language of the section that it applies only to cases where the statute defining an offense has been *repealed. The act of July 2d was not repealed* by the enabling act, for it yet applies to the territories of the United States. [Italics ours.]

The saving clause only applies "where the statute defining an offense has been repealed," and the court held that the statute involved in that case had not been repealed. The court held that the Federal District Court of Utah did not have power to try an indictment found in the territorial court before Utah became a State, because "no such power has been bestowed upon it by any special legislation." (P. 471.)

The Circuit Court of Appeals in the *Green* case also greatly relied upon the case of *City of Sonora* v. *Curtin*, 137 Cal. 583, 589. It quotes the following from that opinion:

> The authority under which the ordinance for revenue purposes was passed being repealed, the ordinance is repealed as to all such purposes, and must be regarded as if it never existed, except for the purposes of those actions which were commenced, prosecuted, and concluded while it was an existing law. * * *
>
> In such case the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause.

We do not controvert these principles of law unless it is contended that the repealing statute itself must contain the saving clause. The law is settled that the saving clause may be in a general statute, as is Section 13 of the Revised Statutes.

IV

THE COURT BELOW SHOULD NOT HAVE APPLIED THE COMMON-LAW RULE TO THE TWENTY-FIRST AMENDMENT, AS SUCH RULE IS OPPOSED TO PRESENT PUBLIC POLICY, BUT IT SHOULD HAVE APPLIED THE PRINCIPLES OF THE STATUTORY RULE

This Court has said that the Constitution must be "interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 654. Since the first ten Amendments embody guarantees and immunities inherited from our English ancestors, they are to be interpreted in a like manner. Cf. *Robertson* v. *Baldwin*, 165 U.S. 275, 281. Clearly, this Court has always sought and applied those principles of law which were familiar and *controlling at the time* the constitutional provision, or Amendment, in question was adopted.

What principle of law governing the effect of repeals was most familiar and most controlling throughout the United States in 1933 when the Twenty-first Amendment was adopted?

The Ninth Circuit Court of Appeals has said (p. 10):

> The constitutional amendment (Amendment XXI) contains no saving clause and Congress is powerless to enact one, either before or after the repeal, hence the general rule is applicable with reference to the effect of a repeal of a penal statute on pending cases.

The "general rule" which the court applied was the old common-law rule abrogated in American jurisprudence.

There is no reason, we submit, why the courts should resurrect this dead rule and apply it, rather than apply the living statutory rule of construction which obtains in the Federal and state courts.

In Goldberg v. *United States*, 280 Fed. 89 (C.C.A. 5th), certiorari denied, 260 U.S. 728, the effect of Section 13 of the Revised Statutes upon the repeal of the statute arising from the adoption of the Eighteenth Amendment was considered. The court held (pp. 89–90):

> One who had committed the offense of selling intoxicating liquors without having paid the special tax required of retail liquor dealers, prior to the adoption of the Eighteenth Amendment and the enactment of the National Prohibition Act, can be tried and punished for that offense after national prohibition took effect, under Rev. St. Section 13, providing that the repeal of any statute shall not have the effect to release any penalty unless the repealing act shall expressly so declare. [Syllabus.]

The court said (p. 91):

> The War Prohibition Act was not intended to repeal the general provisions of law for the collection of internal revenue, and none of those provisions were intended to be or were repealed, superseded or supplanted until the Eighteenth Amendment and the National

Prohibition Act (41 Stat. 305) became effective.

Inasmuch as the trial occurred after the effective date of the amendment and the National Prohibition Act, it is also contended that either the amendment or the last-mentioned act repealed the revenue provisions of the Revised Statutes and the War Prohibition Act, and that therefore, although it was a violation of the law to engage in the business of a retail liquor dealer at the time the indictment was found, punishment could not be imposed, because of the repeal before trial. This contention is untenable, in view of section 13, Revised Statutes, which provides that the repeal of any statute shall not have the effect to release any penalty, forfeiture, or liability unless the repealing act shall expressly so declare. There is no such declaration in the National Prohibition Act.

Historically, one of the last pronouncements of the common law rule—that after repeal without a saving clause, no further proceedings can be had under the Act repealed—came from this Court in 1870 in *United States* v. *Tynen*, 11 Wall. 88. Thereupon Congress promptly passed "An Act prescribing the Form of the enacting and resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof" (Act approved February 25, 1871, c. 71, 16 Stat. 431) which is now Sec. 13, Revised Statutes (U.S.C., Title I, Sec. 29). The prior rule of construction was there changed and, as changed, has remained for the past sixty-two years

as a strong protest in Federal jurisprudence against the old order.

It is a most wholesome and salutary rule of construction which superseded the archaic rule of the common law in the Federal courts a few years after the Civil War and has been enforced consistently since that time. *United States* v. *Barr*, 4 Sawyer 254, called it "a salutary provision."

Why should the courts be powerless to punish for crimes committed under a valid criminal law, merely because for satisfactory reasons the statute has been repealed?

There is no difference in principle between the repeal of a statute by statutory enactment and by a constitutional enactment; both are done by Congress, but the latter is not effective until approved by three-fourths of the States. One is passed by Congress while the other is proposed by Congress and adopted by three-fourths of the States. Obviously, the intent of the framers is, in either case, the same. Then why should there be one rule of construction for that repeal which is passed by Congress while a different rule controls that which is merely proposed by Congress?

Under either method of repeal, the statute is a dead letter after the repeal, and if the courts have power to punish for offenses committed before the repeal when the repeal is by statutory enactment, the courts have equal power to punish for like offenses when the repeal is by constitutional provision.

If Congress had seen fit to repeal the Volstead Act before it adjourned last June, no one would contend

that the courts would have been powerless to punish for offenses committed between the repeal and the ratification of the Twenty-first Amendment in December, but it would be contended that after the ratification of the Twenty-first Amendment, the courts were thereafter impotent because the Eighteenth Amendment was repealed, and as Congress had passed the Volstead Act pursuant to power conferred by the Eighteenth Amendment, that power was withdrawn, and if the Volstead Act had still been in force, it would have been repealed by implication and would thereby have expired and become dead as a law. Had Congress, however, repealed the Volstead Act before the ratification of the Twenty-first Amendment, that Amendment would not have repealed the Volstead Act—it would not have affected the *status quo*, except to take away from Congress the power to reenact the Volstead law or similar legislation; but Congress is not now attempting to do this and we submit that the established statutory rule of construction must obtain and be applied rather than the discarded common law rule.

In denying the applicability of Section 13 of the Revised Statutes, the court below said:

> The Prohibition Act is not terminated by any act of Congress; it becomes obsolete without repeal and therefore the point is not presented of a repeal by an act of Congress; bringing it within the construction of this statute.

The Circuit Court of Appeals in *Green* v. *United States*, unlike the court below, held that the effect of

the adoption of the Twenty-first Amendment was to repeal the National Prohibition Act, citing authorities to sustain its holding that—

> An amendment of a state constitution which is inconsistent with existing legislation repeals such legislation. [Citing many cases.]

With this statement of the law the Government agrees.

But it does not agree with the court below that there is no occasion for bringing in the rule of construction unless there has been express repeal by statute. When the common law rule of construction was applicable to statutes, Chief Justice Marshall, in *General Pinkney*, 5 Cranch 281, said that it applied "after the expiration or repeal of a law." If the common law rule was then applicable to repeal, express or implied, the statutory rule of construction should now be applicable to both.

It is only necessary that the old statute be repealed in order to make effective Section 13, Revised Statutes, unless otherwise provided in the repealing Act. The cases establish the principle that repeal may be by an express repeal by statute, or it may be by implication by the enactment of a statute inconsistent with the old statute, or it may be a repeal by implication by a constitutional amendment which is inconsistent with the old statute or by withdrawing from the legislative arm of the Government the power to enact the old statute, as in this case, or it may be by an enactment creating a new State whereby

the authority of Congress to make acts criminal in the jurisdiction of the new State is taken away.

In whatever way the old statute is repealed, the saving clause becomes operative unless express provision inconsistent therewith is contained in the repealing law, and this irrespective of whether the repealing law is by way of statutory or constitutional enactment. For in either way the old statute becomes a dead letter, and to this situation the rule of construction embodied in the Federal statute attaches.

As pointed out in *Great Northern Railway Co.* v. *United States*, 208 U.S. 452, 465, "This provision but embodies Section 4 of the Act approved February 25, 1871, c. 71, 16 Stat. 431, which was entitled 'An Act prescribing the Form of the enacting and resolving Clauses of Acts and Resolutions of Congress, and rules for the construction thereof.' As the section of the Revised Statutes in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment. But while this is true the provisions of Section 13 are to be treated as if incorporated in and as a part of subsequent enactments, and therefore under the general principles of construction requiring, if possible, that effect be given to all the parts of a law the section must be enforced unless either by express declaration or necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the provisions of Section 13."

The law which struck down and repealed the statute under which the respondents were indicted was the Constitutional enactment, and this enactment of Congress, approved by the requisite number of States, became the supreme law of the land—a repealing Act of the highest dignity. We submit that it cannot be successfully contended that considering this law as a whole "the legislative mind will be set at naught by giving effect to the provisions of Section 13."

The rule of construction contained in Section 13 of the Revised Statutes has become firmly entrenched in judicial decisions. Indeed, the modern "trend" was noted in *Hertz* v. *Woodman*, 218 U.S. 205, 216, where this Court said:

> There has been a marked legislative trend in the direction of escaping from the serious consequence sometimes incident to this common-law rule of construction, indicated by general statutes saving liabilities, penalties and forfeitures incurred under repealed statutes. Such a general statute was passed by Congress on February 25, 1871, ch. 71, 16 Stat. 431, the fourth section of which was carried into the revision of 1878 and is now in force as Section 13, Rev. Stat. * * *
>
> This provision has been upheld by this court as a rule of construction applicable, when not otherwise provided, as a general saving clause to be read and construed as a part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress. *United States* v. *Reisinger*, 128 U.S. 398; *Great Northern Ry. Co.* v. *United States*, 208 U.S. 452.

Section 13 of the Revised Statutes evidenced the public policy of the Federal Government on the effect of any "repealing act." The saving clause was in full force and effect when the Twenty-first Amendment was passed by Congress for submission to the States. It was unquestionably well known, therefore, to the Congress which proposed the Twenty-first Amendment. Its principles—rather than those of the common law—should, therefore, be applied as a rule of construction to the Amendment.

This Amendment was framed by Congress, passed as a joint resolution by both Houses, and by them submitted to the States. Had Congress intended to reverse its own long established policy and rule of construction, it would have inserted in the Amendment which it drafted and submitted to the States a provision that the ratification of the Amendment should release any liability incurred under the National Prohibition Act passed pursuant to the Eighteenth Amendment, but it did not see fit to do so.

The rule of construction thus laid down by the Federal statute was like similar rules in a number of States, and later statutes to the same effect have been enacted in many of the other States. Statutory provisions from forty-three States, which differ somewhat in phraseology have been set forth at length in an appendix to this brief. Canada [3] and England [4] have similar provisions.

[3] For Canada, see Revised Statutes, 1927, c. 1, Sec. 19.

[4] In England, see Interpretation Act, 1889, 52 and 53 Vict., c. 63, Sec. 38.

The statutes of these States show that in the year 1933, when the Twenty-first Amendment was proposed by two-thirds of each House of Congress, and adopted by conventions in three-fourths of the States, the almost universal rule throughout the United States was that the repeal of a criminal law did not debar prosecution for crimes committed before its adoption. These statutes—and not the common law—declare the principles known among the States by which the Twenty-first Amendment was adopted. It is submitted that the repealing provisions of the Twenty-first Amendment should be construed in the light of this almost universal rule.

If this modern rule of construction is applied, then Section 13 of the Revised Statutes has the effect of permitting violations of the National Prohibition Act committed while the Act was in full force and effect to be punished under the same principle as if the repeal had been by statutory enactment rather than by constitutional Amendment.

The *Green* case conceded that although Congress had not the power to enact the prohibition law after the repeal of the Eighteenth Amendment, yet power could have been given the courts to punish in pending cases. In that case, however, it was pointed out that the plan pursued by Congress did not have this effect because it did not insert such a provision in the Amendment itself. The general law in force when Congress submitted the Amendment provided that pending cases were saved unless the law repealing the criminal statute provided otherwise. With full

knowledge of this law, Congress in drafting the Twenty-first Amendment and in the resolution passed by it to submit to the States assumed, and had a right to assume, that in construing the effect of the Amendment upon pending cases the courts would apply the general rule then in full force and vigor, and not the so-called "general rule" of the common law, which the court below and the Ninth Circuit applied—a rule which had been repudiated and annulled in the Federal and state governments.

If the Twenty-first Amendment is so construed, there can be no doubt of the validity of Section 13 of the Revised Statutes as now applied to the National Prohibition Act.

There is today a desire for uniformity in the law. This cannot be attained if repealing *constitutional enactments* are to be construed under the old common law rule, while repealing *statutory enactments* are to be constructed under a modern and contrary rule. Indeed, the intent of a Congress which *proposed* an Amendment could scarcely have been different from the intent of a Congress which *passed* a statute.

This Court, in *Funk* v. *United States*, No. 394, October Term, 1933, decided December 11, 1933, rejected an aged rule of the common law on the competency of witnesses even though it had not been changed by Congress. Its reasoning is pertinent here—"The public policy of one generation may not, under changed conditions, be the public policy of another." We submit that there is no reason why the courts should apply to this situation a rule of

construction of the common law which has been changed by Congress and by practically all the state legislatures rather than an existing rule of construction, substituted for the common law rule—and which rule of construction, if applied, will prevent defendants who have committed crimes under existing statutes from escaping punishment, and there will be obviated "the lame and impotent conclusion" referred to in the *Barr* case, and the serious consequences adverted to in *Hertz* v. *Woodman*.

The law should be so enforced as to apply alike to all. If the rule of construction contended for by the respondents is upheld, then the spectacle will be presented of some defendants committing a joint offense escaping punishment while others of the joint offenders may now be serving terms or may have paid fines imposed upon them. Let us take a case where four defendants were jointly indicted for the violation of the National Prohibition Act. The trial occurred more than three months before the Twenty-first Amendment was ratified. Three of the defendants were tried and convicted; one of them was fined and has paid his fine, the second was sentenced to prison and is now serving his term, the third was sentenced to prison but appealed his case which is now pending on appeal, and the fourth defendant ran away and has just been apprehended. If the old common law rule is applied, the defendant who appealed and the defendant who absconded will both go scot free. It was to avoid just such a result as this that Congress and the States changed the rule of the common law.

In the American Bar Association Journal of ~~October~~ November 1923 (pp. 715–721), there is an article by Albert Levitt on "Repeal of Penal Statutes and Effect on Pending Prosecutions," in which are cited most of the State and Federal cases dealing with the common-law rule. The writer reaches the conclusion that the rule is not based upon sound reason and that the repeal of a statute should have no effect whatever upon pending prosecutions founded upon the provisions of the repealed statute. No doubt Congress and the States were actuated by like reason in abrogating the common-law rule, for the crime is complete as of the date of the criminal act.

CONCLUSION

The Government submits that the "dead hand of the common law" should not be applied to such a case as we have here but "in the light of general authority and sound reason" the salutary, statutory rule of construction should be applied, which will result in the judgment of the lower court being reversed.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

JOSEPH B. KEENAN,
Assistant Attorney General.

N. J. MORRISSON,
Special Assistant to the Attorney General.

ROBERT P. REEDER,
Attorney.

January, 1934.

APPENDIX

The statutes of the several States which have abrogated the common law rule of construction are:

ALABAMA

Code of 1928, sec. 5532: No repeal, revision, amendment or alteration of any law shall in any manner affect any prosecution for an offense committed under the law so repealed, revised, amended, or altered, unless the repealing, revising, amending or altering law shall otherwise expressly provide * * *.

ARIZONA

Rev. Code 1928, sec. 3046: No action or proceeding commenced before any repealing act takes effect, and no right accrued is affected by such repealing act, but proceedings therein shall conform to the new act so far as applicable.

ARKANSAS

Statutes 1919, sec. 9758: When any criminal or penal statute shall be repealed, all offenses committed or forfeitures accrued under it while it was in force shall be punished or enforced as if it were in force, notwithstanding such repeal, unless otherwise expressly provided in the repealing statute.

CALIFORNIA

Political Code, 1923, sec. 329: The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the

law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act.

COLORADO

Compiled Laws, 1921, sec. 6519, sec. 4: The repeal, revision, amendment or consolidation of any statute or part of a statute or section or part of a section of any statute, shall not have the effect to release, extinguish, alter, modify or change in whole or in part any penalty, forfeiture or liability, either civil or criminal, which shall have been incurred under such statute, unless the repealing, revising, amending or consolidating act shall so expressly provide * * *.

CONNECTICUT

General Statutes, 1930, sec. 6561: The repeal of any statute defining or prescribing the punishment for any crime shall not affect any pending prosecution or any existing liability to prosecution and punishment therefor, unless expressly provided in the repealing statute that such repeal shall have that effect.

FLORIDA

Constitution, Art. III, sec. 32: The repeal or amendment of any criminal statute shall not affect the prosecution or punishment of any crime committed before such repeal or amendment.

GEORGIA

Code, 1926, Penal Code, sec. 18: All crimes shall be prosecuted and punished under the laws in force at the time of commission thereof, notwithstanding the repeal of such laws before such trial takes place.

HAWAII

Revised Laws, 1925, sec. 25: No suit or prosecution pending at the time of the repeal of any law, for any offense committed, or for the recovery of any penalty or forfeiture incurred under the law so repealed, shall in any case be affected by such repeal.

IDAHO

Compiled Statutes, 1919, sec. 116: The repeal of any law creating a criminal offense does not constitute a bar to the indictment and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment and punishment is expressly declared in the repealing act.

ILLINOIS

Smith-Hurd Illinois Rev. Stats. 1929, chap 131, sec. 4: No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform, so far as practicable, to the laws in force at the time of such proceeding. * * *

INDIANA

Burns Annotated Indiana Stats., 1926, sec. 255: * * * And the repeal of any statute shall not have the effect to release or extinguish any penalty,

forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide; and such statute shall be treated as still remaining in force for the purposes of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

IOWA

Code, 1931, sec. 63: * * * The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the statute repealed. * * *

KANSAS

Revised Statutes, 1923, sec. 77–201: In the construction of the statutes of this State the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the statute:

First. The repeal of a statute does not revive a statute previously repealed, nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed. * * *

KENTUCKY

Carroll's Statutes, 1930, sec. 465: No new law shall be construed to repeal a former law as to any offense committed against a former law, nor as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any

penalty, forfeiture, or punishment so incurred, or any right accrued or claim arising before the new law takes effect, save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. * * *

MAINE

Revised Statutes, 1930, chap. 1, sec. 5: * * * The repeal of an act does not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, or proceeding pending at the time of the repeal, for an offense committed or for recovery of a penalty or forfeiture incurred under the act repealed. Actions pending at the time of the passage or repeal of an act are not affected thereby.

MARYLAND

Bagby's Annotated Code, 1924, Art. 1, sec. 3: The repeal of any statute "including the repeal of any part of the Code of Public General Laws or of the Code of Public Local Laws" shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

MASSACHUSETTS

General Laws, 1932 ed., chap. 4, sec. 6: * * *
First. * * *
Second. The repeal of a statute shall not affect any punishment, penalty or forfeiture incurred before the repeal takes effect, or any suit, prosecution or proceeding pending at the time of the repeal for any

offense committed, or for the recovery of a penalty or forfeiture incurred, under the statute repealed.

MICHIGAN

Act No. 25, Public Acts 1931: Sec. 4-a. The repeal of any statute or part thereof shall not have the effect to release or relinquish any penalty, forfeiture, or liability incurred under such statute or any part thereof, unless the repealing act shall so expressly provide, and such statute and part thereof shall be treated as still remaining in force for the purpose of instituting or sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

MINNESOTA

Mason's Minnesota Statutes, 1927, sec. 10930: Whenever a law is repealed which repealed a former law, the former law shall not thereby be revived, unless it is so specifically provided; nor shall such repeal affect any right accrued, any duty imposed, any penalty incurred, or any proceeding commenced, under or by virtue of the law repealed.

MISSISSIPPI

Annotated Code, 1930, sec. 1361: No statutory change of any law affecting a crime or its punishment or the collection of a penalty shall affect or defeat the prosecution of any crime committed prior to its enactment, or the collection of any penalty, whether such prosecution be instituted before or after such enactment; and all laws defining a crime or prescribing its punishment, or for the imposition of penalties, shall be continued in operation for the purpose of providing punishment for crimes committed under them, and for collection of such penalties, notwithstanding

amendatory or repealing statutes, unless otherwise specially provided in such statutes.

MISSOURI

Revised Statutes, 1929, sec. 661: No offense committed, and no fine, penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, shall be affected by such repeal; but the trial and punishment of all such offenses, and the recovery of such fines, penalties and forfeitures, shall be had, in all respects, as if the provisions had remained in force.

MONTANA

Revised Codes, 1921, chap. 5, sec. 97: The repeal of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act.

NEBRASKA

Compiled Statutes, 1929, secs. 49–301: Whenever a statute shall be repealed, such repeal shall in no manner affect pending actions founded thereon, nor causes of action not in suit that accrued prior to any such repeal, except as may be provided in such repealing statute.

NEVADA

Hillyer's Compiled Laws, 1929, sec. 11265: The superseding of any law creating a criminal offense shall not be held to constitute a bar to the indictment or information and punishment of a crime already committed, or to bar the trial and punishment of a crime where an indictment or information

and punishment has been already found, for a violation of the law so superseded, unless the intention to bar such indictment, information and punishment where an indictment has been already found or an information filed, is expressly declared in the superseding act.

NEW HAMPSHIRE

Public Laws, 1926, chap. 2, sec. 36: No suit or prosecution, pending at the time of the repeal of an act, for any offense committed or for the recovery of a penalty or forfeiture incurred under the act so repealed, shall be affected by such repeal.

NEW JERSEY

Compiled Statutes, p. 4971, sec. 4: That no offense committed, and no liability, penalty or forfeiture, either civil or criminal, incurred previous to the time when any statutory provision shall be repealed or altered by this act, or by any act hereafter passed, shall be discharged or affected by the repeal or alteration of any statute under which such offense, liability, penalty or forfeiture was incurred, unless it be expressly declared in the act of the legislature whereby such repeal or alteration is or shall be made, that offenses, liabilities, penalties or forfeitures already committed or incurred shall be thereby released or discharged; * * *

NEW MEXICO

Statutes, 1929, Art. 4, sec. 33: No person shall be exempt from prosecution and punishment for any crime or offense against any law of this State by reason of the subsequent repeal of such law.

NEW YORK

Cahill's Consolidated Laws 1930, chap. 23, sec. 93: The repeal of a statute or part thereof shall not affect or impair any act done, offense committed or right accruing, accrued or acquired, or liability, penalty, forfeiture, or punishment incurred prior to the time such repeal takes effect, but the same may be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such repeal had not been affected.

Sec. 94: Unless otherwise specially provided by law, all actions and proceedings, civil or criminal, commenced under or by virtue of any provision of a statute so repealed, and pending immediately prior to the taking effect of such repeal, may be prosecuted and defended to final effect in the same manner as they might if such provisions were not so repealed.

NORTH CAROLINA

Code, 1931, sec. 8103: No offense committed and no penalty or forfeiture incurred under any of the statutes hereby repealed, and before the time when such repeal shall take effect, shall be affected by the repeal.

Sec. 8104: No action or proceedings pending at the time of the repeal, for any offense committed, or for the recovery of any penalty or forfeiture incurred under any of the statutes hereby repealed shall be affected by such repeal, except that the proceedings in such action or proceeding shall be conformed, when necessary, to the provisions of the Consolidated Statutes.

NORTH DAKOTA

Compiled Laws, 1913, sec. 7316: The repeal of any statute by the legislative assembly shall not have the

effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

OHIO

Throckmorton's Annotated Code, 1930, sec. 26: Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, shall not affect pending actions, prosecutions, or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment of repeal, unless otherwise expressly provided in the amending or repealing act.

OKLAHOMA

Statutes, 1931, sec. 13911: The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute. (This section is Art. 5, sec. 54, of the State Constitution.)

OREGON

Annotated Code, 1930, sec. 14–1008: In all cases hereafter occurring where a criminal statute or a part of a criminal statute shall be either amended or repealed, the criminal statute or the part of the criminal statute so amended or repealed shall be and remain in

force for the purpose of authorizing the prosecution, indictment, trial, conviction and punishment of all persons who shall have violated such criminal statute or part of a criminal statute so amended or repealed prior to the taking effect of the act so amending or repealing such criminal statute or part of a criminal statute.

RHODE ISLAND

General laws, 1923, sec. 417: No suit, prosecution or indictment, pending at the time of the repeal of any statute for any offense committed, or for the recovery of any fine, forfeiture, or penalty, incurred under the statute so repealed, shall in any case be affected by such repeal, but such suit, prosecution, or indictment may be proceeded with, and such act shall be deemed to be in force for the purpose of prosecuting the same to final judgment and execution or sentence, as the case may be.

SOUTH DAKOTA

Compiled Laws, 1929, sec. 39: The repeal of any statute by the legislature shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

TENNESSEE

Code, 1932, sec. 12: Repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed.

UTAH

Compiled Laws, 1917, sec. 5842: The repeal of a statute does not revive a statute previously repealed, nor affect any right which has accrued, any duty imposed, any penalty incurred nor any action or proceeding commenced under or by virtue of the statute repealed.

VERMONT

General Laws, 1917, sec. 37: The repeal of an act shall not revive one which has been repealed, nor affect an act done, a right accruing or accrued, acquired or established, or a suit or proceeding had or commenced in a civil cause before the time when the repeal takes effect; nor shall it affect a suit pending at the time of such repeal for the recovery of a penalty or forfeiture incurred under the act so repealed.

VIRGINIA

Code, 1930, sec. 6: No new law shall be construed to repeal a former law, as to any offense committed against the former law, or as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture, or punishment so incurred, or any right accrued, or claim arising before the new law takes effect. * * *

WASHINGTON

Remington's Rev. Stats. An., 1932, sec. 2006: No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal,

unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. * * *

WEST VIRGINIA

Official Code, 1931, chap. 2, art. 2, sec. 8: The repeal of a law, or its expiration by virtue of any provision contained therein, shall not affect any offense committed, or penalty or punishment incurred, before the repeal took effect, or the law expired, save only that the proceedings thereafter had shall conform as far as practicable to the laws in force at the time such proceedings take place, unless otherwise specially provided; * * *

WISCONSIN

Statutes, 1929, sec. 370.04: The repeal of a statute hereafter shall not remit, defeat or impair any civil or criminal liability for offenses committed, penalties or forfeitures incurred or rights of action accrued under such statute before the repeal thereof, whether or not in course of prosecution or action at the time of such repeal; but all such offenses, penalties, forfeitures and rights of action created by or founded on such statute, liability wherefor shall have been incurred before the time of such repeal thereof, shall be preserved and remain in force notwithstanding such repeal, unless specially and expressly remitted, abrogated or done away with by the repealing statute. * * *

WYOMING

Revised Statutes, 1931, sec. 112–104: Whenever a statute is repealed or amended such repeal or amendment shall in no manner affect pending actions, prosecutions or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecutions or proceedings, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act.

U. S. GOVERNMENT PRINTING OFFICE: 1939